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IN THE HIGH COURT OF CHHATTISGARH AT BILASPUR.

Cr.A.No...67.../2002.

APPELLANTS : 1. Jageswar, son of Ramadhar Tiwari
Aged about 43 years.

2. Mithilesh Kumar, son of Jageswar
aged about 18 years.

Both residents of Furfundi
Thana Baberu, Distt Banda (U.P.)
At present residents- Gongaon,
Thana Khamtarai, Distt Raipur (C.G.).

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Filed on 10-1-02
by Shri U.S. Singh Chandel Advocate
R. to AR's

VERSUS

RESPONDENTS : STATE OF CHHATTISGARH.

MEMO OF APPEAL UNDER SECTION 374(2) OF THE CODE OF CRIMINAL PROCEDURE.

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आदेश पत्रक

मामला क्रमांक Criminal Appeal 671 सन् 2002

विरुद्ध

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

Division Bench :
Hon'ble Shri Justice L.C. Bhadoo, J &
Hon'ble Shri Justice V.K Shrivastava, J.

02.12.2005

Shri UKS Chandel, counsel for the appellants.

Shri G.K. Beriwal, Additional Public Prosecutor with Shri Akhil Mishra, Panel lawyer for the State / respondent.

Learned counsel for the parties submit that whole case rests on the evidence of two witnesses namely, Pradeep Viswas (PW-3) and Anita Sarkar (PW-6). Therefore, they pray that the matter may be heard finally.

With the consent of the parties, the matter is heard finally.

Oral judgment.

By this appeal accused / appellants No.1 -Jageswar Tiwari and No.2 - Mithilesh Kumar have questioned the legality of their conviction and sentence awarded by the 4th Additional Sessions Judge Raipur vide judgment dated 03.11.2001 in Sessions trial No.244/2001, whereby learned Additional Sessions Judge after holding the accused / appellants guilty for commission of the offence under Section 302, in the alternative 302/34 of the IPC, sentenced each of them to undergo imprisonment for life and to pay fine of Rs.500/-, in default of payment of fine to further undergo 3months RI.

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2) The case of the prosecution in brief is that on 10.03.2001, on Holi festival, between 12 - 2 pm, PW-3 Pradeep Viswas was going to his house and when he reached near the house of accused / appellant No.2 - Mithilesh Kumar, he stopped him and said that after consuming liquor, why the father of Pradeep Viswas is quarrelling with his father. In the meantime, accused / appellant No.1 - Jageshwar Tiwari also came there and both of them started beating Pradeep Viswas. On seeing this, his aunt (mami) Anita Sarkar went and called her husband Kishan Sarkar, the deceased. By that time, the accused / appellants climbed to the roof of the house and started throwing tiles towards Kishan Sarkar. Kishan Sarkar also tried to climb the roof, upon which both the accused / appellants pushed him, as a result of which he fell down. Accused / appellant No.2 - Mithilesh threw spade towards Kishan Sarkar, which was with him at that time, by which he received an injury on his head and neck and blood started oozing. On seeing this, Pradeep Viswas immediately went to the Police patrolling party and gave Dehati Nalisi Ex.P/5 and his uncle Kishan Sarkar was taken to the Mokahara Hospital by the Police patrolling party. After registering the case Ex.P/9, Bharatendu Dwivedi took up the investigation. However, Kishan Sarkar succumbed to the injuries in the hospital.

3) The investigation Officer took into possession the blood stained soil & plain soil from the place of occurrence under Ex.P/8, the spade under Ex.P/9. Panchnama

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Ex.P/3 of the dead body was prepared by him. The postmortem was conducted by Dr Sanjay Kumar Dadu (PW-1). He prepared Postmortem report Ex.P/1. After completion of the investigation, charge sheet was filed in the Court of Judicial Magistrate First Class Raipur, who in turn committed the case to the Sessions Judge Raipur from where learned 4th Additional Sessions Judge received the case on transfer for trial.

4) The prosecution, in order to prove the offence against the accused / appellants, examined nine witnesses. Statements of the accused / appellants were recorded under Section 313 of the Cr.P.C. by learned Additional Sessions Judge in which both of them denied the prosecution evidence. They stated that they have been falsely implicated in the crime. Accused / appellant No.1 - Jageshwar further stated that brother-in-law of the deceased (Pradeep Viswas) had beaten him and his wife, therefore, in defence, he threw the tiles and he had not seen the deceased. Whereas, Mithilesh accused /appellant No.2 has stated that he was not at the scene of the occurrence at the time of the incident. After hearing learned counsel for the parties, learned Additional Sessions Judge convicted and sentenced the accused / appellants as mentioned above.

5) We have heard learned counsel for the parties. They did not dispute the fact that death of the deceased was homicidal. Apart from

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that, from the evidence of PW-3 Pradeep Viswas, eyewitness and PW - 6 Anita Sarkar, it is established that the accused / appellants pushed the deceased from the roof, as a result of which he received injuries on the neck and head. PW-1 Dr.Sanjay Kumar Dadu, who conducted postmortem on the dead body, has also stated that the cause of death was injuries on the neck and head and he died due to cardio respiratory failure, as a result of survical injury and its complications. Therefore, in view of the above evidence it is established that death of the deceased was homicidal in nature.

6) Learned counsel for the accused / appellants argued that even if the prosecution evidence is accepted on the face value, the offence against the accused / appellants does not travel beyond 304/II of the IPC for the reason that when Kishan Sarkar, the deceased came on the scene of occurrence, both the accused / appellants climbed on the roof of their house and when the deceased was chasing them, they pushed him in order to save themselves and in that process, Kishan Sarkar received the injurjes. No intention can be attributed to the accused / appellants that they did this with an intention to murder Kishan Sarkar. More over, height of the roof of the house was not more than 6 ft.

7) On the other hand, Shri Akhil Mishra supports the judgment of the trial Court. From the evidence of PW-3 Pradeep Viswas, and

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PW-6 Anita Sarkar, wife of the deceased, who were present at the scene of occurrence, it is established that at the first instance, Mithilesh Kumar started quarrelling with Pradeep Viswas, on seeing this; Anita Sarkar called her husband Kishan Sarkar, the deceased. When the deceased came to the scene of occurrence, accused / appellants climbed on the roof of their house and when Kishan Sarkar was climbing on the roof, they pushed him, as a result of which he fell down and received the injuries. Therefore, the accused / appellants were involved in the crime in question and because of their push, Kishan Sarkar fell down and received injuries.

8) Coming to the nature of the offence proved against accused / appellants is concerned, as per the prosecution evidence i.e. the evidence of PW-3 Pradeep Viswas and PW-6 Anita Sarkar, wife of the deceased; on being called by his wife, when Kishan Sarkar came to the scene of occurrence, the accused / appellants climbed on the roof of their house. However, the deceased followed them and he also tried to climb on the roof, but the accused / appellants pushed him down from the roof and he fell down and received injuries on the head and neck. Accused / appellant No.2 Mithilesh Kumar threw the spade towards Kishan Sarkar.

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9) PW-3 Pradeep Viswas has stated that he does not know which injury was received to the deceased by the spade. Even PW-1 Dr Sanjay Kumar Dadu, who conducted postmortem, has not stated that any injury was received by the spade. Therefore, from the prosecution evidence, plain case is, accused / appellants pushed the deceased when he was trying to climb on the roof. There is nothing in evidence thro-ugh which an inference can be drawn that the accused / appellants with an intention to cause the death of Kishan Sarkar, pushed him and as a result of which he received injuries. It appears from the evidence that when Kishan Sarkar was trying to climb on the roof in order to chase the accused / appellants, in order to save themselves, they pushed Kishan Sarkar and as a result of that he fell down and received injuries on his head and neck which proved fatal and he succumbed to those injuries. But from the above facts, it can be attributed to the accused / appellants that they were having knowledge that due to their pushing, Kishan Sarkar may fall and he may receive injuries, which may result in his death.

10) No other point was argued by learned counsel for the accused appellants.

11) In the result, the appeal is partly succeeds and the conviction under Section 302 of the IPC and sentence awarded under that Section

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are set aside. Instead there of, the accused / appellants are convicted for commission of the offence under Section 304-II of the IPC and each of them is sentenced to undergo RI for five years.

12) Accused / appellants shall be entitled to the set off the period for which they remained in the custody during the investigation and trial against the sentence awarded to them.

13) Accused / appellant No.2 - Mithilesh is already on bail and it is stated that he has undergone three years six months in custody. He shall surrender himself before the trial Court to serve out whatever sentence remained to be served out by him.

14) In view of the above, M.(Cri.)P.No.2239/2005 stands disposed of.

Sd/-
L.C.BHADOO
Judge

Sd/-
V.K. Shrivatava
Judge

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